IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
No. 33132

CHARLES E. CANTERBURY,

Petitioner,

v.

WILLIAM R. LAIRD, IV, in his individual and official capacity as Sheriff of Fayette County, J.E. SIZEMORE, in his individual and official capacity as a Fayette County Sheriff's Office detective; S.W. KESSLER, in his individual and official capacity as a Fayette County Sheriff's Office detective; J.W. WRISTON, in his individual and official capacity as a Fayette County Sheriff's Office detective; DENNIS SPANGLER, in his official capacity as Chief of Police of the Ansted Police Department; W.K. WILLIS, in his individual and official capacity as an Ansted Police Department lieutenant; PAUL BLAKE, in his individual and official capacity as prosecuting attorney of Fayette County; GLEN A. CHAPMAN, in his individual and official capacity as a Mount Hope Police Department detective; LES FOSTER, in his individual and official capacity as Chief of Police of Mount Hope Police Department; CITY OF ANSTED, a municipal corporation; THE COUNTY COURT OF FAYETTE COUNTY, a political subdivision, CITY OF MOUNT HOPE, a municipal corporation.

Appellees.

BRIEF OF FAYETTE COUNTY APPELLEES

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I. INTRODUCTION

This case asks whether: 1) the Appellant has waived her malicious prosecution claim and whether it is otherwise meritless; 2) the circuit court properly granted summary judgment on the false arrest claim when Appellant missed the statute of limitations by three years and the claim is otherwise without merit; and, 3) whether Appellees are entitled to qualified immunity because they enforced a statute that was facially valid at the time of the arrest and had been interpreted as constitutional by the United States Court of Appeals for the Fourth Circuit. Because the answer to all of these questions is yes, this Court should affirm the circuit court.

II. FACTS

On June 14, 2001, Sheriff's Deputies discovered that Appellant, Mr. Canterbury, had failed to comply with W. Va. Code § 61-3-51 requiring dealers who trade gems and precious metals to report such transactions to the Sheriff or Police Chief, to require an affidavit of ownership, and to keep a register of each trade to be open to law enforcement. Appellant was processed, arraigned, and released on bond,[1] but was never incarcerated as a result of the arrest.[2]

The grand jury indicted Appellant on 24 violations of W. Va. Code § 61-3-51.[3] The circuit court then certified a question asking if W. Va. Code § 61-3-51 applied to pawn brokers and transactions.[4] The circuit court concluded the statute did not extend to pawns

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[1]Sum. Jud. Ord. at 3 ¶ 2.

[2]*Id.*

[3]*Id.* ¶ 3. Dec. 9, 2005 at 19.

[4] Sum. Jud. Ord. at ¶ 4.

and this Court refused to docket the certified question.[5] The circuit court's summary judgment order found that this Court's decision implicitly affirmed the circuit court's decision[6]–although this is wrong both because this Court lacks jurisdiction to consider a certified question in a criminal case[7] and because "[t]his refusal to docket the case certified cannot be considered, either as to the trial court or this Court, as a final adjudication of the questions certified."[8]

After this Court's refusal to docket the certified question, the circuit court granted the State's motion to dismiss all of the pawn counts in the indictment.[9] The State subsequently informed Appellant it intended to re-indict him for purchases rather than pawns.[10] He filed a petition for a writ of prohibition which this court issued in *State ex rel. Canterbury v. Blake*[11] finding that W. Va. Code § 61-3-51 was in desuetudinum.

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[5]*Id.*

[6]*Id.* ¶5

[7]Syl. Pt. 2 *State v. Lewis*, 188 W. Va. 85, 422 S.E.2d 807 (1992) (quoting Syl. Pt. 2, *State v. Brown*, 159 W. Va. 438, 223 S.E.2d 193 (1976)); *State ex rel. Forbes v. Canady*, 197 W. Va. 37, 42, 475 S.E.2d 37,42 (1996). *Accord Bass v. Coltelli*, 192 W. Va. 516, 519, 453 S.E.2d 350, 353 (1994).

[8]*Work v. Rogerson*, 149 W. Va. 493, 496, 142 S.E.2d 188, 192 (1965), *overruled on other grounds by Pearson v. Dodd*, 159 W. Va. 254, 221 S.E.2d 171 (1975).

[9]Sum. Jud. Ord. at 4 ¶ 6.

[10]*Id.*

[11]*Id.* at 4-5 ¶ 9 (citing *State ex rel. Canterbury v. Blake*, 213 W. Va. 656, 584 S.E.2d 512 (2003) (per curiam)).

On August 16, 2004, Appellant sued, *inter alia*, the Fayette County Appellees.[12] He voluntarily dismissed his selective prosecution count[13] and the circuit court granted all the remaining defendants summary judgment.[14]

III. STANDARD OF REVIEW

"'A circuit court's entry of summary judgment is reviewed *de novo*.'"[15] Accordingly, this Court applies "the same standard for granting summary judgment as a circuit court would."[16]

"[Summary judgment under] Rule 56 of the West Virginia Rules of Civil Procedure plays an important role in litigation in this State."[17] "Indeed, it is one of the few safeguards in existence that prevent frivolous lawsuits from being tried which have survived a motion to dismiss. Its principal purpose is to isolate and dispose of meritless litigation."[18] "Summary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the

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[12]*Id.* at 5 ¶ 11.

[13]*Id.* at 12 ¶ IV.1; Dec. 9, 2005 Tr. at 32-33.

[14]The Court also dismissed J.E. Wriston because Appellant did not perfect service on him. Sum. Jud. Ord. at 21; Dec. 9, 2005 Tr. at 32-33, 44. Appellant does not object to the dismissal. Pet'n App. at 4 n.1.

[15]Syl. Pt. 1, *Subcarrier Communications, Inc. v. Nield*, 218 W. Va. 292, 624 S.E.2d 729 (2005) (quoting Syl. Pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994)).

[16]*United Bank, Inc. v. Blosser*, 218 W. Va. 378, 624 S.E.2d 815, 820 (2005).

[17]*Painter v. Peavy*, 192 W. Va. 189, 192 n.5, 451 S.E.2d 755, 758 n.5 (1994).

[18]*Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 58, 459 S.E.2d 329, 335 (1995).

case that it has the burden to prove."[19] "If the requirements of the Rule are met, summary disposition is appropriate[;]"[20] and, in fact, is mandatory since summary judgment "is not a remedy to be exercised at the circuit court's option; it must be granted when there is no genuine disputed issue of a material fact."[21]

IV. ARGUMENT

Appellant's malicious prosecution claim is 1) defaulted before this Court; 2) barred by Appellees' immunity; or, 3) substantively meritless. Appellant's false arrest claim is 1) substantively without merit; and, 2) barred by Appellees' immunity. For these reasons the circuit court should be affirmed.

A. The Sheriff and the County Commission are immune from any liability.

W. Va. Code § 7-14A-4 provides:

> "no sheriff shall be held jointly or severally liable on his official bond or otherwise for any act or conduct of any deputies . . . except in cases where such deputy is acting in the presence of and under the direct, immediate and personal supervision of such sheriff, nor shall the county commission of a county nor the county itself be held so liable."

Here, Appellant proffers no evidence that the Sheriff was physically present when the arrest occurred or when the prosecution was initiated.[22] Consequently, the Sheriff and the County Commission are absolutely immune from any action at all.

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[19]Syl. pt. 2, *Id.*

[20]*Jividen v. Law*, 194 W. Va. 705, 713 n.11, 461 S.E.2d 451, 459 n.11 (1995).

[21]*Powderidge Unit Owners Ass'n v. Highland Prop., Ltd.*, 196 W. Va. 692, 698, 474 S.E.2d 872, 878 (1996). *Accord Berardi v. Meadowbrook Mall Co.*, 212 W. Va. 377, 382, 572 S.E.2d 900, 905 (2002) (per curiam); *Payne v. Weston*, 195 W. Va. 502, 506, 466 S.E.2d 161, 165 (1995).

[22]Exhibits B and F, *Defendants William R. Laird, IV, J.E. Sizemore, Paul Blake, and the Fayette County Commission's Memornadum of Law in Support of Motion for Summary Judgment.*

Further, the County Commission is a political subdivision under the West Virginia Governmental Tort Claims and Insurance Reform Act.[23] Under the Act, a political subdivision is only liable for the negligence of its employees.[24] Malicious prosecution and false arrest are intentional torts.[25] Consequently, the County Commission is absolutely immune from any liability in this case.

B. Discussion of the malicious prosecution claims.

1. Appellant waived malicious prosecution by not raising it in his Petition for Appeal.

Appellant's brief raises an assignment of error relating to malicious prosecution.[26] However, his Petition for Appeal did not raise malicious prosecution as an assignment of error. An assignment of error not raised in a Petition for Appeal may not be raised in a Brief.[27] The malicious prosecution claim is not properly before this Court and should not be addressed by it. In any event, the malicious prosecution assignment of error is also substantively meritless.

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[23]*Moats v. Preston County Comm'n*, 206 W. Va. 8, 12 n.3, 521 S.E.2d 180, 184 n.3 (1999).

[24]W. Va. Code § 29-12A-4(c)(1) & (4).

[25]*Cline v. Joy Mfg. Co.*, 172 W. Va. 769, 772 n.7, 310 S.E.2d 835, 838 n.7 (1983).

[26]Appellant's Br. at 6. Appellees liberally construe Appellant's brief to reach this conclusion. *See State v. LaRock*, 196 W .Va. 294, 302, 470 S.E.2d 613, 621 (1996).

[27]*Koerner v. West Virginia Dep't of Military Affairs*, 217 W. Va. 231, 237, 617 S.E.2d 778, 784 (2005) (noting that in *Holmes v. Basham*, 130 W. Va. 743, 754, 45 S.E.2d 252, 258 (1947) it "refused to consider an argument in an Appellant's brief that was not assigned as an error in the petition for appeal.").

2. Appellee Blake is absolutely immune from a malicious prosecution claim.

At the time pertinent in this case, Judge Blake was Prosecuting Attorney. "[I]t is well settled 'that at common law prosecutors were immune from suit[ ] for malicious prosecution [.]'"[28] "To hold . . . that a public prosecutor, whose duty it is to enforce the laws of the United States, is not exempt because of what he says and does in the discharge of the duties of his office, is so unreasonable, so contrary to sound public policy, and to the fundamental principles of our jurisprudence, that we cannot accept it."[29] As Section 656 of the *Restatement (Second) of Torts* iterates, "A public prosecutor acting in his official capacity is absolutely privileged to initiate, institute, or continue criminal proceedings." Judge Blake is immune from malicious prosecution and no action lies against him.

3. Appellees are entitled to summary judgment because Appellant failed to show genuine issues of material fact on essential elements of malicious prosecution.

"[T]he tort of malicious prosecution traditionally has been disfavored."[30] "It has been well said that 'actions for malicious prosecutions are regarded by the law with jealousy. Lord Holt said, a hundred and fifty years ago, that they "ought not to be favored, but managed with great caution."'"[31] This Court has noted that in malicious prosecution a "high level of proof is required because: 'The public policy favors prosecution for crimes and requires the protection of a person who in good faith and upon reasonable grounds

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[28] *Belcher v. Paine*, 612 A.2d 1318, 1325 (N.H. 1992) (quoting *Burns v. Reed*, 500 U.S. 478, 485 (1991)).

[29] *Yaselli v. Goff*, 12 F.2d 396, 404 (2d Cir. 1926), *summarily aff'd*, 275 U.S. 503 (1927).

[30] *McCammon v. Oldaker*, 205 W. Va. 24, 31, 516 S.E.2d 38, 45 (1999).

[31] *Brady v. Stiltner*, 40 W. Va. 289, 294 21 S.E. 729, 731 (1895).

institutes proceedings upon a criminal charge. The legal presumption is that every prosecution for crime is founded upon probable cause and is instituted for the purpose of justice.'"[32] When undisputed evidence establishes probable cause, "it is the province of the court to deny right of recovery by direction of a verdict for the defendant[.]"[33]

"To sustain an action of trespass on the case for malicious prosecution of either a civil suit, action or proceeding, or a criminal charge, there must be a showing, from a preponderance of the evidence, of both malice and want of probable cause in the prosecution complained of. Absence of a showing of either is fatal to the plaintiff's claim for recovery."[34] While proof of a lack of probable cause may support an inference of malice,[35] "'[w]ant of probable cause is not established by, and may not be inferred from, a showing of malice in the prosecution of a . . . criminal charge.'"[36] Therefore, lack of probable cause is a threshold showing as it is only upon a lack of probable cause that malice becomes an issue. "Where want of probable cause is shown malice may be inferred therefrom; but even if malice is shown, want of probable cause may not be inferred therefrom, but must be established as an independent proposition."[37] "When such cause may reasonably be said to exist, the motives prompting the formal accusation become

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[32]*Morton v. Chesapeake & Ohio Ry. Co.*, 184 W. Va. 64, 67, 399 S.E.2d 464, 467 (1990) (per curiam).

[33]Syl. Pt. 1, in part, *Bailey v. Gollehon*, 76 W. Va. 322, 85 S.E. 556 (1915).

[34]Syl. Pt. 2, *Hunter v. Beckley Newspaper Corp.*, 129 W. Va. 302, 40 S.E.2d 332 (1946).

[35]Syl. Pt. 3, *Hunter v. Beckley Newspapers Corp.*, 129 W. Va. 302, 40 S.E.2d 332 (1946).

[36]Syl. Pt. 1, in part, *Wright v. Lantz*, 133 W. Va. 786, 58 S.E.2d 123 (1950) (quoting Syl. Pt. 4, *Hunter v. Beckley Newspapers Corp.*, 129 W. Va. 302, 40 S.E.2d 332 (1946)).

[37]*Id.*, 58 S.E.2d at 127.

immaterial, on the ground of public policy."[38] "If there was probable cause," even "the existence of express malice is immaterial."[39]

Appellant asserts that "[a]n action for malicious prosecution may be maintained if it can be proved that the prosecution was malicious, that it was without *reasonable* or probable cause, and that it terminated favorably to plaintiff."[40] If an "argument is made that there is a substantial difference in the meaning of these expressions, . . . we think there is none. If there was a probable cause of seizure, there was a reasonable cause. If there was a reasonable cause of seizure, there was a probable cause. In many of these reported cases the two expressions are used as meaning the same thing[.]"[41] This Court has recognized the terms are synonymous. "The arrest is justifiable if there exists such a state of facts as constitute in law probable cause, or, as frequently expressed, reasonable, probable cause, or justifiable, probable cause."[42]

Here, "[t]he indictment of the accused by a grand jury is evidence that the person who initiated the proceedings had probable cause for initiating them."[43] "Because plaintiff was indicted, there is a presumption that there was probable cause for the criminal proceeding."[44] Neither before this Court nor the circuit court did Appellant produce any

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[38]Syl. Pt. 3, *Haddad v. Chesapeake & O. Ry. Co.*, 77 W. Va. 710 88 S.E. 1038 (1916).

[39]Syl. Pt. 3, *Bailey v. Gollehon*, 76 W. Va. 322, 85 S.E. 556 (1915).

[40]Appellant's Br. at 5 (emphasis in original).

[41]*Stacey v. Emery*, 97 U.S. 642, 646 (1878).

[42]*Davis v. Chesapeake & O. Ry. Co.*, 61 W. Va. 246, 249, 56 S.E. 400, 401 (1907).

[43]*Restatement (Second) of Torts* § 664(2).

[44] *Santiago v. City of Rochester*, 796 N.Y.S.2d 811, 812 (App. Div. 2005).

evidence or argument that probable cause was lacking. At best he alleges "the arrest was pretextual."[45] But, even if true, it is beside the point since the existence of probable cause makes irrelevant the Appellee's motives[46]–even if such motives are expressly malicious.[47]

C. The circuit court correctly granted summary judgment on the false arrest claim.

1. Appellant was over three years late in filing his complaint under the one year statute of limitations applicable to false arrest claims.

"Statutes of limitation are vital to the welfare of society and are favored in the law. They are found and approved in all systems of enlightened jurisprudence. They promote repose by giving security and stability to human affairs. An important public policy lies at their foundation. They stimulate to activity and punish negligence."[48] Thus, "statutes of limitations . . . cannot be avoided unless the party seeking to do so brings himself strictly within some exception. It has been widely held that such exceptions 'are strictly construed and are not enlarged by the courts upon considerations of apparent hardship.'"[49]

While the question of whether a statute bars an action is generally a question for the jury, "this Court has, on more than one occasion, affirmed summary judgment in cases where the undisputed facts establish that the suit was time-barred pursuant to the

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[45]Appellant's Br. at 6.

[46]Syl. Pt. 3, *Haddad v. Chesapeake & O. Ry. Co.*, 77 W. Va. 710 88 S.E. 1038 (1916). *See also, Whren v. United States*, 517 U.S. 806, 813 (1996).

[47]Syl. Pt. 3, *Bailey v. Gollehon*, 76 W. Va. 322, 85 S.E. 556 (1915)

[48]*Wood v. Carpenter*, 101 U.S. 135, 139 (1879).

[49]*Johnson v. Nedeff*, 192 W. Va. 260, 263, 452 S.E.2d 63, 66 (1994) (citations omitted).

applicable statute of limitations."[50] And, since summary judgment "is not a remedy to be exercised at the circuit court's option [and] must be granted when there is no genuine disputed issue of a material fact[,]"[51] "summary judgment can and should be granted on the basis of an applicable statute of limitations when no genuine issue of material fact exists as to whether the statute of limitations has been violated."[52]

False arrest takes a one year period of limitations.[53] "The statute of limitations ordinarily begins to run when the right to bring an action for personal injuries accrues which is when the injury is inflicted.'"[54] An "injury" in tort is "'"the invasion of any legally protected interest."'"[55]

"Courts protect personal freedom of movement by imposing liability for false imprisonment."[56] "False arrest is a term that describes the setting for false imprisonment when it is committed by an officer or by one who claims the power to make an arrest."[57] The "gist of an action for false arrest is the illegal detention of a person without lawful process

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[50]*Goodwin v. Bayer Corp.*, ___ W. Va. ___, 624 S.E.2d 562, 567 (2005) (per curiam).

[51]*Powderidge Unit Owners Ass'n v. Highland Prop., Ltd.*, 196 W. Va. 692, 698, 474 S.E.2d 872, 878 (1996). *Accord Berardi v. Meadowbrook Mall Co.*, 212 W. Va. 377, 382, 572 S.E.2d 900, 905 (2002) (per curiam); *Payne v. Weston,* 195 W. Va. 502, 506, 466 S.E.2d 161, 165 (1995).

[52]*Goodwin,* ___ W. Va. at ___, 624 S.E.2d at 567.

[53]*Wilt v. State Auto. Mut. Ins. Co.*, 203 W. Va. 165, 170, 506 S.E.2d 608, 613 (1998).

[54]Syl. Pt. 1, *Jones v. Trustees of Bethany College,* 177 W. Va. 168, 351 S.E.2d 183 (1986).

[55]*State of West Virginia ex rel. Chemtall Inc. v. Madden*, 216 W. Va. 443, 455-56, 607 S.E.2d 772, 784-85 (2004) (quoting *Bower v. Westinghouse Electric Corp.*, 206 W. Va. 133, 139, 522 S.E.2d 424, 430 (1999) (quoting *Restatement (Second) of Torts* § 7(1) (1964)).

[56]Dan B. Dobbs, *The Law of Torts* 67 (2000) (footnote omitted).

[57]*Id.*

or by an unlawful execution of such process."[58] Thus, the right protected by false arrest is freedom of movement and the claim accrues when that right is violated, that is when the act complained of deprives the plaintiff of freedom of movement.

In West Virginia, a false arrest is a continuing tort that accrues when the detention ends.[59] Here, Appellant was arrested and made bail the same day, June 14, 2001,[60] and that was the date triggering the statute.[61] "The general rule is . . .'[a] statute of limitations, if pleaded, constitutes a complete bar to an action for false imprisonment begun after the prescribed priod, [sic] even if the proceedings in which the arrest took place are continued within the prescribed time. '"[62]

Appellant, though, claims that he "could not have meaningfully brought his complaint for false arrest while his criminal [sic] the circuit court before his criminal prosecution and the threat of imprisonment was alleviated."[63] The authority is quite the contrary.

Appellant tries to find support in *Klettner v. State Farm* concerning accrual of the cause of action under the Unfair Claims Practices Act[64] and in Federal Circuit Judge

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[58]Syl. Pt. 4, *Vorholt v. Vorholt*, 111 W. Va. 196, 160 S.E. 916 (1931).

[59]*See* Syl. Pt. 1, *Ruffner v. Williams*, 3 W. Va. 243 (1869).

[60]Sum J.D. Ord. at 3 ¶ 2. Dec. 9, 2005 Tr. at 26.

[61]54 C.J.S. *Limitations of Actions* § 200 (2005) (footnote omitted) ("Where the imprisonment begins and ends on the same day, limitations run from that date.").

[62]*Belflower v. Blackshere*, 281 P.2d 423, 425 (Okla. 1955) (citation omitted).

[63]Appellant's Br. at 11-12.

[64]Appellant's Br. at 6-7 (citing 205 W. Va. 587, 519 S.E.2d 870 (1999)).

Posner's dissent in *Wallace v. Chicago.*[65] Neither of these authorities is pertinent.

Appellant contends that *Klettner* bears on this case as "[t]he rationale for this decision was that the issue of liability and damages remain unsettled until the underlying case is resolved and the avoidance of duplicitous litigation."[66] *Klettner*, though, is inapposite. In *Klettner* this Court held that "[t]he one-year statute of limitations which applies to claims of unfair settlement practices brought pursuant to West Virginia Code § 33-11- 4(9) (1996) does not begin to run until the appeal period has expired on the underlying cause of action upon which the statutory claim is predicated."[67] The basis for this rule though is that resolution of the underlying suit is necessary to the adjudication of the bad faith claim. "The critical prerequisite which permits a statutory bad faith claim to go forward is the resolution of the underlying claim. We have never retreated from our original stance that resolution of the issue of damages and liability is a necessary prerequisite to proceeding with a statutory bad faith claim."[68] This Court then explained, "[s]ince an appeal to this Court from the underlying tort action could result in an altered determination on these pivotal issues, until the appeal has been ruled upon there is no final resolution concerning liability and damages."[69] The pertinent point is that the resolution

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[65]*Id.* at 7-11 (quoting 440 F.3d 421, 430-34 (7th Cir.) (Posner, J., dissenting from denial of rehearing en banc), *pet'n for cert. granted*, 126 S. Ct. 2891 (2006) (Mem.).

[66]*Id.*

[67]Syl. Pt. 7, *Klettner v. State Farm*, 205 W. Va. 587, 519 S.E.2d 870 (1999).

[68]*Id.* at 593, 519 S.E.2d at 876.

[69]*Id.*, 519 S.E.2d at 876.

of the underlying case is essential to be able to pursue an UTPA claim because the damages in the underlying suit are integral to the bad faith suit. This is not the case with false arrest.

"In the case at hand, the plaintiff's right of action for false imprisonment accrued at the time of his unlawful arrest. His cause of action was complete when he was released from custody by the giving of bond, and limitations then began running. His cause of action for false imprisonment was completely barred at the end of one year therefrom[.]"[70] "The pendency of the criminal prosecution in no wise affected or tolled the running of the statute of limitations."[71] This rule is bottomed on the recognition that "[t]he gist of an action for false arrest is essentially different from that of an action for malicious prosecution."[72] "Whereas the tort of false imprisonment 'protects the personal interest of freedom from restraint of movement,' the tort of malicious prosecution 'protects the personal interest of freedom from unjustifiable litigation.'"[73]

Thus, unlike malicious prosecution, where a plaintiff must prove a termination of the litigation in his favor so as to demonstrate the litigation was unjustified (so that the date of the termination triggers the statute),[74] there is no requirement that proceedings terminate favorably before a false arrest claim accrues. "Such a requirement that the criminal

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[70] *Mobley v. Broome*, 102 S.E.2d 407, 409 (N.C. 1958), *overruled on other grounds by Fowler v. Valencourt*, 435 S.E.2d 530 (N.C. 1993).

[71] *Id.*

[72] Syl. Pt. 1, *Blevins v. Chesapeake & O. Ry. Co.*, 114 W. Va. 335, 171 S.E. 813 (1933).

[73] *Weintraub v. Board of Ed.*, 423 F. Supp.2d 38, 59 (E.D.N.Y. 2006).

[74] Syl. Pt. 5, in part, *McCammon v. Oldaker*, 205 W. Va. 24, 516 S.E.2d 38 (1999) ("The right to bring an action for malicious prosecution accrues upon the termination of the action complained of in the trial court . . . . ").

proceeding has terminated in plaintiff's favor is not a prerequisite for institution of an action for false arrest, as the form of action is based upon an illegal arrest and no matter *ex post facto* can legalize an act which was illegal at the time it was done."[75] Thus, "[f]or false arrest, the plaintiff can plead all the elements on the day of the arrest regardless of later proceedings."[76] "Favorable termination of prior criminal proceedings in favor of the plaintiff is not an element of false arrest."[77] Hence, "[a]t common law, false arrest actions accrue before the termination of the proceeding."[78]

And, as noted above, post-arrest proceedings have no bearing on the issue of false arrest. "The lack of a conviction however does not vitiate the initial probable cause for arrest."[79] "[I]f an arrest is lawful, the fact that the person arrested is later exonerated or acquitted does not afford basis for an action for false arrest or false imprisonment[.]"[80] Indeed, Appellant's argument places false arrest defendants at the mercy of a proceeding over which the false arrest defendant has no control, thus eviscerating the interests of the defendant and the public protected by the statute:

> If the plaintiff had a meritorious cause of action for false imprisonment, it would not have been affected one way or the other if no criminal charge had

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[75]32 Am. Jur.2d *False Imprisonment* § 8 (2004) (footnote omitted) ("If the confinement leads to a subsequent prosecution, it is generally held that termination of the prosecution is not essential to maintenance of the action.").

[76]*Sneed v. Rybicki*, 146 F.3d 478, 481 (7th Cir. 1998).

[77]*Meyer v. Honolulu*, 729 P.2d 388, 392 (Hawaii Ct. App.), *rev'd on other grounds*, 731 P.2d 149 (Hawaii 1986). *Accord Davis v. Johnson*, 101 F. 952, 954 (4th Cir. 1900).

[78]*Whiting v. Traylor*, 85 F.3d 581, 585 n.8 (11th Cir. 1996).

[79]*State v. Drake*, 170 W. Va. 169, 172, 291 S.E.2d 484, 487 (1982).

[80]*McMechen ex rel. Willey v. Fid. & Cas. Co.*, 145 W. Va. 660, 667, 116 S.E.2d 388, 392 (1960).

> been filed at all, nor by whatever length of time it may have remained pending. Theoretically at least, such a criminal charge may have remained pending for any length of time, including practically indefinitely. This, under plaintiff's contention, could adversely affect the defendant's rights by keeping them open to suit because of proceedings in which they were not parties and over which they had no control. No further exposition is necessary to demonstrate the unsoundness of such a contention.[81]

Appellant also seeks support in Judge Posner's dissent in *Wallace v. Chicago,*[82] now in the United States Supreme Court.[83] This reliance is likewise misplaced.

In *Wallace* the Seventh Circuit addressed when a Fourth Amendment illegal seizure claim accrues for purposes of bringing a claim under 42 U.S.C. § 1983. A discerning eye would immediately observe that at issue in *Wallace* was how to apply the Supreme Court's rule of *Heck v. Humphrey.*[84] *Heck* held a plaintiff could not sue under the federal civil rights act for unconstitutional imprisonment or conviction if a judgment in the civil case would render the conviction or sentence invalid; instead, a plaintiff can only bring such a claim after the conviction is invalidated through post-conviction criminal proceedings.[85] *Heck* ensures that a plaintiff not use a federal civil rights action to short circuit the post-conviction process of state and federal courts and impinge on federalism which requires a state prisoner to exhaust state remedies before moving to federal court.

"[T]he whole point of *Heck* was to keep a state prisoner from challenging his conviction in federal court in the first instance through an unexhausted habeas claim

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[81]*Tolman v. K-Mart,* 560 P.2d1127, 1129 (Utah 1977).

[82]440 F.3d 421 (7th Cir. 2006).

[83]*Wallace v. Chicago,* 126 S. Ct. 2891 (2006) (Mem.).

[84]512 U.S. 477 (1994).

[85]*Id.* at 486-487.

masquerading as a § 1983 claim. Indeed, the requirement that a state prisoner exhaust state remedies before challenging his conviction in federal court has such a basic place in Supreme Court jurisprudence that it hardly needs mentioning."[86] Here, Appellant relies only on state law and *Heck* is inapplicable.[87] Nor do federal cases dealing with issues of the delicate balance between state and federal provide an appropriate analogy to guide this Court on this issue.[88]

In any event, in *Wallace*, the dispute was how *Heck* applied to section 1983 fourth amendment claims such as unlawful search and seizure of evidence or coerced confessions. Critical here, though, is that an illegal arrest in and of itself, *never* undermines a subsequent conviction; "an illegal arrest does not bar prosecution, nor may a conviction be challenged solely on the basis of the illegal arrest."[89]

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[86]*Harvey v. Horan*, 285 F.3d 298, 303 (4th Cir. 2002) (Wilkinson, C.J., concurring in the denial of rehearing and rehearing en banc).

[87]"*Heck* is a rule of federal law that, absent its adoption by the [State] courts, has no application to these state law claims." *Nuno v. County of San Bernardino*, 58 F. Supp.2d 1127, 1130 n.3 (C.D. Cal. 1999). Indeed, this point is so well settled there are few published cases even addressing it, most authority simply being unpublished. *See, e.g., Lamar v. Beymer*, 2005 WL 2464178, *12 (W.D.Ky.) ("the *Heck* preclusion does not apply to the state law claim[.]"); *Childs v. King County*, 2003 WL 21055116, *6 (Wash. Ct. App.) ("But *Heck* involved interpretation of a federal statute; it does not apply to causes of action under state law.").

[88]*See Bhagwagar v. Los Angeles*, 2006 WL 864569, *3 (Cal. Ct. App.) (opinion ordered not certified for publication) ("The plaintiffs in *Alvarez-Machain* and *Heck* sued under federal statutes, not California law. They did not purport to decide when California causes of action accrue. Bhagwagar does not explain why the rationale in those cases should be applied to the state law causes of action at issue here."). Although unpublished, this authority is persuasive, *Modern Develop. Co. v. Nav. Ins. Co.*,4 Cal. Rptr.3d 528, 536 (Ct. App. 2003), and this Court may consider it. *Cf. Henry v. Benyo*, 203 W. Va. 172, 177 n.3, 506 S.E.2d 615, 620 n.3 (1998) (reluctance to cite unpublished non-West Virginia as rendering court did not consider case suitable for publication).

[89]*State v. Farmer*, 193 W. Va. 84, 89, 454 S.E.2d 378, 383 (1994).

Any implication in Appellant's brief that practical problems in pursuing and defending two separate actions is simply not the *ratio decendi* of either *Wallace* or *Heck*. Indeed, the fact that a plaintiff may be forced to purse two separate cases simultaneously has never been thought to preclude the later filed action. For example, in the tort of abuse of process, this Court has said, "[u]nlike an action for malicious prosecution where a legal termination of the prosecution complained of is essential, in an action for abuse of process it is not necessary, ordinarily, to establish that the action in which the process issued has terminated unsuccessfully."[90] "For this reason, a cause of action for abuse of process has been generally held to accrue, and the statute of limitations to commence to run, from the termination of the acts which constitute the abuse complained of, and not from the completion of the action in which the process issued."[91]

2. Because the Sheriff arrested Appellant with probable cause, the circuit court properly granted summary judgment.

"Gist of action for false arrest is illegal detention of person without lawful process, or by unlawful execution of such process."[92] "When an arrest is made upon lawful process, it is error to submit to the jury the question of false arrest."[93] Thus, this Court has held that where an arrest is made pursuant to a regularly issued arrest warrant, no claim for false

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[90] *Preiser v. MacQueen*, 177 W. Va. 273, 280, 352 S.E.2d 22, 29 (1985) (quoting J.A. Bock, Annotation, *When Statute of Limitations Begins to Run Against Action for Abuse of Process*, 1 A.L.R.3d 953, 953-54 (1965)).

[91] *Id.*, 352 S.E.2d at 29.

[92] Syl. Pt. 4, in part, *Vorholt v. Vorholt*, 111 W. Va. 196, 160 S.E. 916 (1933).

[93] Syl. Pt. 2, *Blevins v. Chesapeake & Ohio Ry. Co.*, 114 W. Va. 335, 171 S.E. 813 (1933).

arrest can survive.[94] Here, Appellant was arrested under an arrest warrant[95] so the circuit court properly granted summary judgment. Moreover, the absence of a warrant in this case would not alter the result. "'An officer with authority to conserve the peace may, without a warrant, arrest any person who he, upon reasonable grounds, believes has committed a felony, though it afterwards appears that no felony was actually perpetrated."[96] "'The right to arrest in public without a warrant, based on probable cause that the person has or is about to commit a felony, is the general if not universal rule in this country.'"[97] Violation of W. Va. Code § 61-3-51 constituted a felony.[98] If there was "probable cause, the arrest . . . was legally justified. As a result, the false arrest claim must fail–since 'a necessary element of that claim is an illegal arrest.'"[99] Thus, "it is clear that there was probable cause

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[94]Syl. Pt., *Vorholt v. Vorholt*, 111 W. Va. 196, 160 S.E. 916.

[95]A copy of the warrant and supporting documents are attached hereto. A separate motion to supplement the record has been filed with this Court. *Weimann v. County of Kane*, 502 N.E.2d 373, 377 (Ill. Ct. App. 1986) ("To prevent an entirely unwarranted continuation of litigation in the present case, this court [should] take judicial notice of [the] arrest warrant[.]").

[96]*State v. Cook*, 175 W. Va. 185, 191, 332 S.E.2d 147, 153 (1985) A Sheriff is "a conservator of the peace." 16 Mich. Juris. *Sheriffs* § 3 (2002).

[97]Syl. Pt. 2, *State v. McCarty*, 184 W. Va. 524, 401 S.E.2d 457 (1990) (per curiam) (quoting Syl. Pt. 4, *State v. Howerton*, 174W. Va. 801, 329 S.E.2d 874 (1985)).

[98]W. Va. Code § 61-3-51(e) ("Any person . . . violating any provision of this section shall be guilty of a felony . . . .").

[99]*Henshaw v. Doherty*, 881 A.2d 909, 919 (R.I. 2005) (quoting *Acosta v. Ames Department Stores, Inc.*, 386 F.3d 5, 12 (1st. Cir.2004)). Although some West Virginia cases have said that probable cause and lack of malice are not defenses to actions for false arrest, the language in these cases is unfocused since they dealt with warrantless misdemeanor arrests for offenses not committed in the officers presence. *State ex rel. Morris v. Mills*, 157 W. Va. 674, 681, 203 S.E.2d 362, 674 (1974). In other words, even if the officer had probable cause to believe that a misdemeanor had been committed outside of his presence, such probable cause is irrelevant as "[a] warrantless arrest for a misdemeanor cannot be effected unless the offense is committed in the presence of the officer." *State v. Byers*, 159 W. Va. 596, 603, 224 S.E.2d 726, 731 (1976).

to support plaintiff's arrest, and the existence of probable cause constitutes a complete defense to the claims for false arrest and imprisonment."[100]

Here, Appellee Sizemore, prepared a Report of Investigation, detailing that he had a Sheriff's Department Intern purport to sell a gold wedding band to Appellant.[101] Sizemore then waited the twenty-four hours to see if Appellant reported the sale as W. Va. Code § 61-3-51(b) required.[102] Sizemore determined that such required notification had not been made.[103] Sizemore had probable cause to believe that Appellant violated a then extant felony statute, a conclusion buttressed by Appellant's indictment.[104] "'An officer, with authority to conserve the peace, may, without a warrant, arrest any person who he, upon probable cause, believes has committed or is committing a felony, though it afterwards appears that no felony was actually perpetrated.'"[105] "When an arrest is made upon lawful process, it is error to submit to the jury the question of false arrest."[106]

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[100] *Molina v. New York* , 814 N.Y.S.2d 120, 121 (App. Div. 2006).

[101] Exhibit B, *Response of Plaintiff to the Fayette County Defendants' Motion for Summary Judgment and Counter Motion for Summary Judgment.*

[102] *Id.* at 5.

[103] *Id.* at 6.

[104] *See Campanaro v. Rome*, 999 F. Supp. 277, 280 (N.D.N.Y. 1998) ("This finding is further buttressed by the grand jury's actions in charging the Plaintiff . . . ").

[105] *State v. Cook*, 175 W. Va. 185, 191, 332 S.E.2d 147, 153 (1985) (quoting Syl. Pt. 2, *State v. Duvernoy*, 156 W. Va. 578, 195 S.E.2d 631 (1973)).

[106] Syl. Pt. 2, *Blevins v. Chesapeake & Ohio Ry. Co.*, 114 W. Va. 335, 171 S.E. 813 (1933).

D. Appellant has produced no evidence that the Fayette County Appellees were responsible for property allegedly taken from him.

Appellant says that he had property taken from him.[107] Assuming such damages are available in false arrest,[108] at the summary judgment hearing Appellant's lawyer averred that "an officer from the town of Mount Hope [that] took some of his personal property during the raid and did not return it[.]"[109] Appellant has not implicated the County Appellees in his alleged property loss and summary judgment for them was proper.

E. Appellees are entitled to summary judgment under qualified immunity.

Appellant has failed to make out any substantive claims so the issue of qualified immunity is moot. In any event, simply because the Court in *State ex rel. Canterbury v. Blake,*[110] found W. Va. Code § 61-3-51 void does not negate qualified immunity.

"Immunities under West Virginia law are more than a defense to a suit in that they grant governmental bodies and public officials the right not to be subject to the burden of trial at all. The very heart of the immunity defense is that it spares the defendant from having to go forward with an inquiry into the merits of the case."[111] "The policy considerations driving such a rule are straightforward: public servants exercising their

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[107]Appellant's Br. at 12.

[108] Appellant did not bring any claims for torts that protect property. *See, e.g., Greenawalt v. Indiana Dep't of Corr.*, 397 F.3d 587, 590 (7th Cir. 2005) (noting that freedom of movement is protected by the tort of false imprisonment but property is protected by the torts of trespass and of conversion).

[109]Dec. 9, 2005 Tr. at 37.

[110]213 W. Va. 656, 584 S.E.2d 512 (2003).

[111]*Hutchison v. Huntington,* 198 W. Va. 139, 148, 479 S.E.2d 649, 658 (1996).

official discretion in the discharge of their duties cannot live in constant fear of lawsuits, with the concomitant costs to the public servant and society."[112]

"Admittedly, our law with regard to public official immunity is meager."[113] This Court has recognized, though, that, "[a] police officer in the performance of his duty as such is a minister of justice and entitled to the peculiar protection of the law."[114] "Common sense dictates that in the proper performance of such duties, their actions should be appraised with a fair degree of benignity and charity."[115]

This Court has also noted that Federal courts have developed "a substantial body of law regarding immunity for public officials. This law has developed by considering common law immunity concepts[.]"[116] "The United States Supreme Court has pointed out that the law of official immunity has developed from common law principles because there is an absence of any applicable Congressional legislation on the subject."[117] "Thus, these precepts are compatible with our common law traditions."[118]

"[T]his Court has devised an objective test for evaluating official conduct under our immunity statutes. [Its] cases suggest that whether qualified immunity bars recovery in a civil action turns on the objective legal reasonableness of the action assessed, in light of the

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[112]*Id.*, 479 S.E.2d at 658.

[113]*State v. Chase Securities, Inc.*, 188 W. Va. 356, 359, 424 S.E.2d 591, 594 (1992).

[114]*McMechen*, 145 W. Va. at 669, 116 S.E.2d at 393.

[115]*Id.*, 116 S.E.2d at 393.

[116]*Chase Securities, Inc.*, 188 W. Va. at 359, 424 S.E.2d at 594.

[117]*Id.* at 359 n.6, 424 S.E.2d at 594 n.6.

[118]*Id.* at 359, 424 S.E.2d at 494.

legal rules that were clearly established at the time it was taken."[119] This is a forgiving standard.

This Court observed, "[n]o system of jurisprudence has yet been invented that is infallible. Mistake and injustice to the individual will occur under any judicial system, in the application of either civil or criminal jurisprudence."[120] Qualified immunity "gives ample room for mistaken judgments[,]"[121] "whether the mistake is one of fact or one of law."[122] "This accommodation for reasonable error exists because 'officials should not err always on the side of caution' because they fear being sued."[123] "[T]he love of justice may not always be strong enough to induce individuals to commence prosecutions when, if they fail, they may be subjected to expense of litigation, if they be not mulcted in damages."[124] "Therefore, in the absence of any wilful or intentional wrongdoing, to establish whether public officials are entitled to qualified immunity, we ask whether an objectively reasonable official, situated similarly to the defendant, could have believed that his conduct did not violate the plaintiff's . . . rights, in light of clearly established law and the information possessed by the defendant at the time of the allegedly wrongful conduct?"[125] This test protects "'all but the

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[119]*Hutchison,* 198 W. Va. at 148-49, 479 S.E.2d at 658.

[120]*McMechen* 145 W. Va. at 669, 116 S.E.2d at 393.

[121]*Malley v. Briggs,* 475 U.S. 335, 343 (1986).

[122]*Butz v. Economou,* 438 U.S. 478, 507 (1978).

[123]*Hunter v. Bryant,* 502 U.S. 224, 229 (1991) (per curiam) (quoting *Davis v. Scherer,* 468 U.S. 183, 196 (1984)).

[124]*Brady v. Stiltner,* 40 W. Va. 289, 295, 21 S.E. 729, 732 (1895).

[125]*Hutchison v. Huntington,* 198 W. Va. 139, 149, 479 S.E.2d 649,658 -59 (1996).

plainly incompetent or those who knowingly violate the law.'"[126]

The question of qualified immunity here involves two issues: 1) whether a reasonable law enforcement officer should even be expected to know of the doctrine of desuetude; and, if so, 2) whether a reasonable law enforcement officer, even knowing of the doctrine of desuetude, would know that West Virginia Code § 61-3-51 was void under it. Because the answer to these two questions is no, the circuit court properly granted summary judgment.

The "obscure civil law doctrine of desuetude,"[127] is "hardly a familiar principle to modern law students,"[128] much less law enforcement officers. Indeed, desuetude is counter-instinctive in the Anglo-American legal tradition. "[M]ost courts and commentators agree with Justice Douglas' dissent in *Poe v. Ullman* that desuetude 'is contrary to every principle of American or English common law.'"[129] "Certainly we cannot expect our police officers . . . be held to a . . . legal scholar's expertise in constitutional law."[130] Indeed, before 2001, when the arrest occurred, this Court never discussed desuetude in a criminal or civil rights case. The only three cases addressing it were *Printz*, a legal ethics case, *Pryor v. Gainer*,[131] a civil case dealing with legislative appropriations, and *Killen v. Logan County*

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[126]*Id.* at 148, 479 S.E.2d at 658 (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

[127]Corey R. Chivers, *Desuetude, Due Process, and the Scarlet Letter Revisited*, 1992 Utah L. Rev. 449, 449.

[128]Mark Peter Henriques, Note, *Desuetude and Declaratory Judgment: A New Challenge to Obsolete Laws*, 76 Va. L. Rev. 1068, 1057 (1990).

[129]Robert Misner, *Minimalism, Desuetude, and Fornication*, 35 Williamette L. Rev. 1, 16 (1999) (quoting *Poe v. Ullman*, 367 U.S. 497, 511 (1961) (Douglas, J., dissenting))

[130]*Saldana v. Garza*, 684 F.2d 1159, 1165 (5th Cir. 1982).

[131]177 W. Va. 218, 351 S.E.2d 404 (1986).

Commission,[132] where this Court said, "[t]he rule of desuetude is not the law of this jurisdiction."[133] But even if Appellees should have know about desuetude, they are still entitled to qualified immunity as a reasonable police officer could not have known that W. Va. Code § 61-3-51 was in desuetude until so declared by a court of competent jurisdiction.

"Proxies such as ignorance of the law or desuetude, . . . give little guidance to police and prosecutors regarding when they may or may not enforce the law."[134] For example, in West Virginia desuetude applies when, *inter alia*, "[t]he statute proscribes . . . acts that are *malum prohibitum* and not *malum in se*[.]"[135] "But we cannot overlook that what crimes belong in which category has been the subject of controversy for years."[136] As this Court has recognized, making such a determination of *malum in se* and *malum prohibitum* "is not an exact science."[137] And the whole area has been characterized as "an extremely confused body of law[.]"[138] the very antithesis of being "clearly established."

The "[u]se of the malum in se/malum prohibitum distinction as an interpretive device has been criticized by various commentators as imprecise, unreliable, and unsound

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[132]170 W. Va. 602, 295 S.E.2d 689 (1982).

[133]*Id.* at 617, 295 S.E.2d at 705.

[134]Sherry F. Colb, *The Qualitative Dimension of Fourth Amendment "Reasonableness,"* 98 Colum. L. Rev. 1642, 1725 n.261 (1998).

[135]Syl Pt. 3, in part, *Committee on Legal Ethics v. Printz*, 187 W. Va. 182, 416 S.E.2d 720 (1992).

[136]*Jordan v. De George*, 341 U.S. 223, 236-37 (1951) (Jackson, J., dissenting).

[137]*J.M. v. Webster County Bd. of Ed.*, 207 W. Va. 496, 503, 534 S.E.2d 50, 57 (2000).

[138]*Hendrix v. Seattle*, 456 P.2d 696, 726 (Wash. 1969) (Finely, J., dissenting), *majority opinion overruled by McInturf v. Horton*, 538 P.2d 499 (Wash. 1975).

in principle."[139] "Indeed, the most persistent criticism of the malum in se/malum prohibitum distinction has been that it is notoriously difficult to determine the category into which many crimes fit."[140] Notably, courts and scholars have defined malum in se crimes to include felonies,[141] and W. Va. Code § 61-3-51(e) created a felony–an important distinction since the statute at issue in *Printz,* West Virginia's direct progenitor of desuetude, was only a misdemeanor statute.[142]

"The important point is that most crimes seem to have both *malum in se* and *malum prohibitum* qualitites."[143] Of particular note here is that "there are both numerous regulatory crimes that are not *malum prohibitum*. . . and *malum prohibitum*-type crimes

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[139]*State v. Keihn,* 542 N.E.2d 963, 967 (Ind. 1989); 1 Wayne R. LaFave, *Substantive Criminal Law* § 1.6(b) (noting "[t]he difficulty of classifying particular crimes as *malum in se* or *malum prohibitum* [.]").

[140]Stuart P. Green, *Why It's a Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses,* 46 Emory L. J. 1533, 1577 (1997). And, of course, regulatory statutes themselves are not always only malum prohibitum. "In short, the line between malum in se and malum prohibitum has been crossed many times and largely discredited. Today, to rule out worker safety, toxic dumping, or environmental pollution as necessarily beyond the scope of the criminal law requires one to defend an antiquarian definition of blameworthiness." John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"? Reflections on the Disappearing Tort/Crime Distinction in American Law,* 71 Boston U. L. Rev. 193, 200 (1991).

[141]*See, e.g., Commonwealth v. Adams,* 114 Mass. 323, 324 (1873) ("Acts *mala in se* include, in addition to felonies, all breaches of public order, injuries to person or property, outrages upon public decency or good morals, and breaches of official duty, when done wilfully or corruptly."). *Accord State v. Bowser,* 261 P. 846, 850 (Kan. 1927) (following *Adams*); *Fishwick v. State,* 10 Ohio N.P. (N.S.) 110 (C.P. 1910) (same). *See also People v. Datema,* 533 N.W.2d 272, 278 n.15 (Mich. 1995) ("Professors Perkins and Boyce describe offenses malum in se as including all felonies, all breaches of public order, and injuries to person or property."); *Garnett v. State,* 632 A.2d 797, 813 n.12 (Md. 1993) ("*Malum in se* crimes usually include all felonies . . . .").

[142]*Printz,* 187 W. Va. at 185, 416 S.E.2d at 720.

[143]*Id.* at 1577.

that are not regulatory."[144] Indeed, an argument has been made that a person who violates a *malum prohibitum* crime in ignorance may properly be punished if the conduct reveals the actor "is insufficiently committed to the moral values the law reflects."[145] As one commentator has observed, "[e]ven the first modern 'white collar' offenses to be criminally prosecuted–price-fixing, tax fraud, securities fraud, and, later, foreign bribery–were 'regulatory' crimes in the sense that they had not been traditionally considered blameworthy. In short, the line between malum in se and malum prohibitum has been crossed many times and largely discredited."[146] In fact, because W. Va. Code § 61-3-51 is based upon industry practice,[147] modern notions would find its violation blameworthy in a criminal sense.[148] W. Va. Code § 61-3-51 represents a legislative effort to temper the transfer, receipt and, sale of stolen goods,[149] offenses that are morally culpable and which are *malum in se*.[150] Moreover, desuetude requires "a conspicuous policy of nonenforcement."[151]

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[144]*Id.* at 1574-75.

[145]Uri Matthew Myerson, Note, *Requiring Accountability Among Those Who Sell Firearms: Ignorance of the Law Should Not be an Excuse*, 22 Card. L. Rev. 665, 699 n. 172 (2001) (quoting Dan M. Kahn, *Ignorance of the Law is an excuse – But Only for the Virtuous*, 96 Mich. L. Rev. 127, 146 (1997)).

[146]Coffee, *Does "Unlawful" Mean "Criminal"?*, 71 Boston U. L. Rev. 193 at 200.

[147]*Gallaher v. Huntington* 759 F.2d 1155, 1156 n.1 (4th Cir. 1985) (noting that W. Va. Code § 61-3-51 is comparable to the Jewelers of America proposed "Act Regulating Purchases of Jewelry, Precious Metals and Stones" and observing W. Va. Code § 61-3-51 is similar to the "Regulation of Precious Metal Dealers Act," found in 41 *Suggested State Legislation* 146 (1982)).

[148]Coffee, *Does "Unlawful" Mean "Criminal"?*, 71 Boston U. L. Rev. 193 at 201 ("At some point, a civil standard can become so deeply rooted and internalized within an industry or professional community that its violation becomes blameworthy, even if it was not originally so.").

[149]*Gallaher*, 279 F.2d at 1156.

[150]"[G]enerally, a crime involving "moral turpitude," is *malum in se*[.]'" *J.M.*, 207 W. Va at

(continued...)

The territorial extent within which the statute must not have been enforced is a subject of doubt,[152] although "the general opinion of the Romans seems to have been that a statute could be abrogated per desuetudinem in the form of a contrary custom prevalent throughout the whole territory to which the statute applied."[153] This dispute is evident in West Virginia's desuetude law. While *Canterbury* found that this prong of the desuetude was satisfied because of non-enforcement of W. Va. Code § 61-3-51 in Fayette County,[154] roughly a year and a half-later this Court found in *State v. Donley*,[155] that even if a defendant could prove that a statute had not been employed in Hancock County, "it is insufficient in scope to satisfy the *Printz* requirement of nonenforcement."[156] Since it is an unsettled question in this Court as to whether only county-wide nonenforcement satisfies

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[150](...continued)
503, 534 S.E.2d at 50 (citation omitted). *See Mourikas v. Vardianos*, 169 F.2d 53, 55 (4th Cir. 1948) (crime of receiving stolen goods is crime of moral turpitude); *Murphy v. State*, 474 So.2d 771, 773 n. 1 (Ala. Ct. Crim. App. 1985) (crimes of moral turpitude include buying, concealing, and receiving stolen goods). *See also Richard B. Stewart, Reconstitutive Justice*, 46 Md. L. Rev. 86, 90 n.5 (1986) ("The difference between these intrinsic and instrumental prescriptions illustrates the difference between malum in se and malum prohibitum. Most prescriptions exhibit both aspects.").

[151]*Printz*, 187 W. Va. at 188, 416 S.E.2d at 726.

[152]*Judicial Abrogation of the Obsolete Statute: A Comparative Study*, 64 Harv. L. Rev. 1181, 1189 n.39 (1951).

[153]*Id.* at 1184.

[154]*Canterbury*, 213 W. Va. at 660, 584 S.E.2d at 516 ("there is no doubt that a conspicuous policy of nonenforcement exists in Fayette County.").

[155]216 W. Va. 368, 607 S.E.2d 474 (2004).

[156]*Id.* at 373 n.3, 607 S.E.2d at 479 n.3.

Printz, it cannot be gainsaid that countywide non-enforcement would alert law enforcement officers that desuetude could be implicated at the time of Appellant's arrest.[157]

Further, W. Va. Code § 61-3-51 was passed in 1981 and a twenty year old statute does not intuitively raise the specter of desuetude.[158] In fact, in 1985, the statute was the subject of a federal opinion from the Fourth Circuit finding it constitutional[159]–thus, in practical effect, making the statute only 16 years old when Appellees sought to enforce it. None of which is to address the validity of *Canterbury* or desuetude (matters as of now decided),

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[157]*Ward v. Johnson*, 690 F.2d 1098, 1112 (4th Cir. 1982) (en banc) ("If . . . we assume that *Baskerville* and *Bratten* are contradictory in their rulings-as has been suggested-that fact, it would seem, would mean that the law as stated in those two cases was in doubt and was not clearly established in this Circuit.").

[158]*See, e.g., District of Columbia v. John R. Thompson, Inc.*, 346 U.S. 100 (1953) (statute criminalizing failure to serve blacks in restaurant enforceable notwithstanding seventy-five years of non-enforcement); *Rhode Island Ass'n of Realtors, Inc. v. Whitehouse*, 199 F.3d 26, 32 (1st Cir. 1999) (statute passed only twenty years earlier); *State v. Nease*, 80 P. 897, 899 (Or. 1905) (statute not enforced for 40 years).

Printz relied on *Poe v. Ullman* as support for desuetude. Commentators have noted that *Poe* was about constitutional standing and not directly desuetude so that it "is of limited precedential support for the traditional doctrine of desuetude." Chivers, *Desuetude, Due Process, and the Scarlet Letter Revisited*, 1992 Utah L. Rev. at 457-58 (footnote omitted). The Supreme Court has rejected desuetude both pre- and post-*Poe*. *See, e.g., John R. Thompson Co.*, 346 U.S. at 113-14 ("The failure of the executive branch to enforce a law does not result in its modification or repeal."); *Kelly v. Washington ex rel. Foss Co.*, 302 U.S. 1, 14 (1937) ("Much is made of the fact that the state law remained unenforced for a long period. But it did not become inoperative for that reason. Where the state police power exists, it is not lost by nonexercise but remains to be exerted as local exigencies may demand."); *Louisville & N. R. Co. v. United States*, 282 U.S. 740, 759 (1931) ("A failure to enforce the law does not change it."). *Cf. Whren*, 517 U.S. at 818 ("[W]e are aware of no principle that would allow us to decide at what point a code of law becomes so expansive and so commonly violated that infraction itself can no longer be the ordinary measure of the lawfulness of enforcement.") Indeed, if *Poe* did implicate desuetude, then its rationale was undermined, if not entirely abandoned, in *Griswold v. Connecticut*, 381 U.S. 479 (1965), where Justice Douglas writing for the majority (Douglas who dissented in *Poe*) voided the statute at issue in *Poe* not on desuetude but as violative of the right to privacy.

[159]*Gallaher v. Huntington*, 759 F.2d 1155 (4th Cir. 1985).

but all of which does establish that Appellees acted well within the boundaries of reasonable and objective law enforcement officers at the time they arrested Appellant.

In sum, the doctrine of desuetude is one of murky application and "understanding often eludes even trained lawyers[.] It is unfair and impracticable to require such an understanding of public officials generally."[160] At the time of the arrest, this Court had not voided W. Va. Code § 61-3-51. "[P]olice officers are expected to have some knowledge of the law, but '[t]he law does not expect police officers to be sophisticated, constitutional or criminal lawyers . . . .'"[161] As clairvoyance to foresee the direction of case law is not a requirement for lawyers to render effective assistance of counsel,[162] neither is it "a prerequisite for qualified immunity[]"[163] for police officers.

"A police officer is not charged with predicting the future course of constitutional law."[164] "Police are charged to enforce laws until and unless they are declared unconstitutional."[165] "The enactment of a law forecloses speculation by enforcement officers concerning its constitutionality– with the possible exception of a law so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see

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[160] *Davis v. Scherer*, 468 U.S. 183, 196 n.13 (1984).

[161] *Anderson v. Continental Ill. Nat. Bank*, 577 F. Supp. 872, 875 n.2 (N.D. Ill.1984) (quoting *Foster v. Zeeko*, 540 F.2d 1310, 1314-15 (7th Cir.1976)).

[162] *State v. Mitchell*, 214 W. Va. 516, 525, 590 S.E.2d 709, 718 (2003) (per curiam).

[163] *Horta v. Sullivan*, 4 F.3d 2, 14 n.13 (1st Cir. 1993).

[164] *Pierson v. Ray*, 386 U.S. 547, 557 (1967).

[165] *Michigan v. DeFillippo*, 443 U.S. 31, 38 (1979).

its flaws."[166] In fact, "the only sure way in which the question of whether or not a statute is in desuetude may be tested is by appeal to the courts."[167] "[I]f statutes may be repealed by process of desuetude, no one can say with certainty whether or not desuetude has effectively set in until the matter has been judicially determined ex post facto."[168]

"Society would be ill-served if its police officers took it upon themselves to determine which laws are and which are not constitutionally entitled to enforcement."[169] "A prudent officer . . . should not have been required to anticipate that a court would later hold the ordinance unconstitutional."[170] Thus, "[t]he validity of an arrest made in good faith reliance on an ordinance is not even affected by a subsequent judicial determination that the ordinance is unconstitutional[.]"[171] "[P]olice action based on a presumptively valid law [i]s subject to a valid defense of good faith[.]"[172] A case applying the common law to a similar factual situation is *Percy v Hall*.[173]

In *Percy*, plaintiffs had been arrested and charged with breaches of the bye-laws but acquitted on the grounds the laws were invalid. The plaintiffs sued for wrongful arrest and

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[166] *Id.*

[167] J. R. Phillip, *Some Reflections on Desuetude*, 260 Jurid. Rev. 260, 264 (1931).

[168] *Id.* at 264.

[169] *DeFillippo*, 443 U.S. at 38.

[170] *Id.* at 37-38.

[171] *State v. Hefner*, 180 W. Va. 441, 445, 376 S.E.2d 647, 651 (1988).

[172] *DeFillippo*, 443 U.S. at 38.

[173] [1997] Q.B. 924 (Ct. App.).

false imprisonment against the arresting constables who defended on the grounds of common law justification. Simon-Brown, L.J., said

> The central question raised here is whether these constables were acting tortiously in arresting the plaintiffs or whether instead they enjoy at common law a defence of lawful justification. This question, as it seems to me, falls to be answered as at the time of the events complained of. At that time these byelaws were apparently valid; they were in law to be presumed valid; in the public interest, moreover, they need to be enforced. It seems to me one thing to accept, as readily I do, that a subsequent declaration as to their invalidity operates retrospectively to entitle a person convicted of their breach to have that conviction set aside; quite another to hold that it transforms what, judged at the time, was to be regarded as the lawful discharge of the constables' duty into what must later be found actionably tortious conduct.[174]

A statute cannot "clearly" be in desuetude until *after* a court declares it to be so; perforce, it cannot be "clearly" established the statute is unenforceable until *after* a court declares it so. Because the Court did not find W. Va. Code § 61-3-51 in desuetude until *after* the arrest, Appellees are entitled to qualified immunity. "'A policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does.'" [175]

In response Appellant invokes *Parkulo v. West Virginia Board of Probation and Parole*, for the proposition that "[i]n order to make a viable claim against an official sufficient to overcome the common law doctrine of qualified immunity, it is sufficient to

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[174] *Id.* at 947.

[175] Syl., in part, *Bennett v. Coffman*, 178 W. Va. 500, 361 S.E.2d 465 (1987), *holding limited on other grounds by State v. Chase Securities, Inc.*, 188 W. Va. 356, 424 S.E.2d 591 (1992).

show that the official acted maliciously, fraudulently and oppressively[.]"[176] Examining each of these terms shows why Appellant's argument fails.[177]

First, "[t]he term malicious is defined as '[s]ubstantially certain to cause injury' and 'without just cause or excuse.'"[178] Here, the existence of probable cause provided such justification and takes this case out of the realm of malice.

Second, there is no allegation that Appellees engaged in any fraudulent conduct. At best there is a claim of pretext, but a pretext search or seizure is a search or seizure without probable cause and illicitly used by the investigators to obtain evidence not otherwise available.[179] Here, Appellant never disputed that probable cause existed.

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[176]Appellant's Br. at 12 (citing 199 W. Va. 161, 483 S.E.2d 507 (1996)).

[177]Addressing these as separate factors is somewhat difficult. *Chase* created an objective test "whether qualified immunity bars recovery in a civil action turns on the objective legal reasonableness of the action assessed, in light of the legal rules that were clearly established at the time it was taken." *Hutchison*, 198 W. Va. at 148-49, 479 S.E.2d at 658-59. "'[A] public official who knowingly and capriciously acts outside the authority of government to deprive a citizen of property rightfully that of the citizen should not be able to escape liability by donning the cloak of government action as an aid to his or her defense." *State Bd. of Chiropractic Examiners v. Stjernholm*, 935 P.2d 959, 974 (Colo. 1997) (quoting *County of Adams v. Hibbard*, 918 P.2d 212, 221 (Colo.1996)). The fraudulent, malicious, or oppressive language in *Chase* simply refers to the fact that until *Chase* the prevailing rule was articulated in *State ex rel. Boone Nat. Bank of Madison v. Manns*, 126 W. Va. 643, 647, 29 S.E.2d 621, 623-624 (1944) that officers performing discretionary duties were (except for fraud) absolutely immune. Thus, under *Boone* even conduct that was malicious or oppressive was not remediable. *Chase's* syllabus point highlights the courts departure from the absolute rule in *Boone*. In essence, syllabus point 2 of *Chase* are two sides of the same coin. *Hutchinson*, though, treated *Chase's* malicious, fraudulent or oppressive language as adding additional factor to the qualified immunity criteria, *id.* at 149, 479 S.E. at 659, which they are not. *Compare Darling v. Burton*, 2005 WL 2337817, *2 (S.D. W. Va.) (*Chase* and *Harlow* are "co-extensive").

[178]*Clark v. Druckman*, ____ W. Va. ____, ____, 624 S.E.2d 864, 871 (2005) (quoting *Black's Law Dictionary* 977 (8th Ed.2004)).

[179]*State v. Hefner*, 180 W. Va. 441, 445, 376 S.E.2d 647, 651 (1988) (quoting Syl. Pt. 4, of *State v. Thomas*, 157 W. Va. 640, 203 S.E.2d 445 (1974)) ("'A pretext arrest . . . with foreknowledge by the officer that the charge cannot be sustained against the suspect, is an unlawful arrest because (continued...)

Third, oppressive conduct is the "unlawful abuse of official authority."[180] Appellant claims he was "set up."[181] The event at issue here was a "'sting' operation–merely a theatrically elaborated method of deploying undercover agents in criminal investigations.'"[182] The "law . . . recognizes that undercover police work is a legitimate investigative technique."[183] "Law enforcement officials may properly use sting operations and informants in order to gain valid consent or to induce criminals to bring stolen goods into plain view."[184] Indeed, due process does not even require any individual suspicion before police may initiate an undercover investigation. "The federal appellate courts that have considered this issue all appear to have concluded that the Constitution does not require either a reasonable basis or reasonable suspicion of wrongdoing by a suspect before the government can begin an undercover investigation of that person."[185] "Courts should

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[179](...continued)
it is not founded on probable cause.'"). *See State v. Drake*, 170 W. Va. 169, 171-172, 291 S.E.2d 484, 486-87 (1982) (distinguishing *Thomas* because the officer effecting the stop had probable cause).

[180]*Commonwealth v. Russ*, 503 A.2d 450, 451 (Pa. Super. Ct. 1986). *Compare id.* at 451-52 (bail bonds man committed oppression by tying bail jumper on roof of car and driving through Philadelphia as an example to others) *and Hope v. Pelzer*, 536 U.S. 730 (2002) (no qualified immunity for handcuffing inmate to hitching post once inmate no longer poses any danger).

[181]Appellant's Br. at 1.

[182]*United States v. Boyd*, 170 F. Supp.2d 1130, 1133 (D. Kan. 2001) (citation omitted).

[183]*Commonwealth v. Garcia*, 659 N.E.2d 741, 744 (Mass. 1996).

[184]*United States v. Salazar*, 44 M.J. 464, 468 (C.A.A.F. 1996).

[185]*United States v. Harvey*, 991 F.2d 981, 990 (2d Cir. 1993). State courts have reached the same conclusion under their respective state constitutions. *See, e.g., State v. Hayes*, 752 A.2d 16, 18 (Vt. 2000); *Commonwealth v. Mance*, 652 A.2d 299, 302 (Pa. 1995);*State v. Walker*, 914 P.2d 1320, 1333 (Ariz. Ct. App. 1995) (state constitutional privacy provision), *superceded by statute on other grounds as stated in State v. Ofstedahl*, 93 P.3d 1122 (Ariz. Ct. App. 2004).

go very slowly before staking out rules that will deter government agents from the proper performance of their investigative duties."[186]

This Court has observed that "[t]here will obviously be those occasions when despite a valid probable cause to arrest, a conviction cannot be obtained."[187] "The gravamen of plaintiff's complaint and theory of liability [though] appears to be that police officers ought to be subject to liability if it later develops that an arrest cannot result in criminal charges. Such an expansion of civil rights laws would wreak havoc with the criminal justice system and virtually paralyze law enforcement."[188]

V. CONCLUSION

For the foregoing reasons, this Court should affirm the circuit court.

THE COUNTY COMMISSION OF FAYETTE COUNTY, WILLIAM R. LAIRD, IV, J.E. SIZEMORE, S.W. KESSLER, AND PAUL BLAKE

By Counsel

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[186] *United States v. Connell*, 960 F.2d 191, 196 (1st Cir. 1992).

[187] *Drake*, 170 W. Va. at 172, 291 S.E.2d at 487.

[188] *Rice v. Jones*, 1992 WL 172684, *2 (E.D. Pa.), *aff'd*, 993 F.2d 878 (3d Cir. 1993) (Table).

IN THE MAGISTRATE COURT OF FAYETTE COUNTY, WEST VIRGINIA

WARRANT FOR ARREST

State of West Virginia
CSD J.K. SIZEMORE
v.

Case No(s). 01-F-205

CHARLES E. CANTERBURY
Defendant AKA "CHUCK" CANTERBURY
PO BOX 425
Address
MOUNT HOPE, WV 25880

FAYETTE COUNTY
CIRCUIT CLERK
2001 AUG -2 P 2:00
THELMA M. KINCAID

To Any Law Enforcement Officer:

WHEREAS this court has found probable cause to believe that the defendant, CHARLES E. CANTERBURY AKA "CHUCK" CANTERBURY, did commit an offense or offenses in this County on the 13-14 day of JUNE, 2001, previous to the issuance of this Warrant, by unlawfully *[State statutory language of offense(s)]*

ND FELONIOUSLY FAIL TO SECURE PROOF OF OWNERSHIP FROM THE SELLER OF AN ITEM OF PRECIOUS METAL AND DID FAIL TO TRULY AND ACCURATELY RECORD SUCH PURCHASE IN A PERMANENT RECORD BOOK CLEARLY SHOWING THE KIND, CHARACTER, AND AMOUNT OF METAL PURCHASED AND DID FAIL TO REPORT SUCH PURCHASE TO THE SHERIFF WITHIN 24 HOURS, THIS IN VIOLATION OF CHAPTER 61-3-51(a);(b) OF THE CODE OF WV.

against the peace and dignity of the State.

Therefore, you are commanded in the name of the State of West Virginia to apprehend the above-named defendant and bring that person before any magistrate in this County, to be dealt with in relation to the charge(s) according to law. This arrest warrant is to be executed in the following manner *(check one)*:

- ☒ Forthwith
- ☐ Between the hours of 9 a.m. and 4 p.m., Monday through Friday
- ☐ Other *(as specified)*: _____

Given under my hand this 14TH day of JUNE, 2001

M.D. PARSONS Magistrate

Executed by: W.S. Carey in Fayette
County, W.Va., on 06-14-01
(Date)

W. Va. Code §50-2-3; Mag. Ct. Crim. Rule 4

SCA-M301/8-95

White - Return
Green - Defendant
Yellow - File
Pink - Prosecutor

IN THE MAGISTRATE COURT OF Fayette COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA

v.

Canterbury, Charles E. AKA "Chuck" Canterbury
Defendant

Case No. 01-F-205

P.O. Box 425 Mt. Hope, WV 25880
Address

233-36-3049
Social Security No.

A659471 (WV)
Driver's License No.

08/23/27
Date of Birth

THELMA M. KINCAID
2001 AUG -2 P 2:03
FAYETTE COUNTY
CIRCUIT CLERK

☐ Misdemeanor
☒ Felony

CRIMINAL COMPLAINT

I, the undersigned complainant, upon my oath or affirmation, state the following is true and correct to the best of my knowledge and belief. On or about 06/13-14/01 (date) in Fayette County, West Virginia, in violation of W.Va. Code *(cite specific section, subsection, and/or subdivision as applicable)* 61-3-51(a);(b) the defendant did *(state statutory language of offense)* Unlawfully and feloniously fail to secure proof of ownership from the seller of an item of precious metal and did fail to truly and accurately record such purchase in a permanent record book clearly showing the kind, character and amount of metal purchased and did fail to report such purchase to the Sheriff within 24 hrs.

I further state that this complaint is based on the following facts: On 06/12/01 I obtained a man's gold wedding band which was appraised as being of 10 karat gold with an approximate value of $65.00 and marked this ring for identification purposes. On 06/13/01 at approximately 1:00pm a cooperating individual wearing a body wire transmitter took this ring into Canterbury's, Inc. Pawn Shop at Hilltop, Fayette County, WV to attempt to sell

Continued on attached sheet? ☒ yes ☐ no

Complainant (who appears before magistrate):

L.K. Sizemore
Name

Fayette County Sheriff's Office
Address

Fayetteville, WV 25840 574-4304
Telephone

Detective/Deputy Sheriff
Office or title, if any

Detective L. K. Sizemore
Complainant Signature

On this complaint, sworn or affirmed before me and signed this date by complainant in my presence, the item(s) checked below apply:

☐ Probable cause found
☐ Summons issued
☒ Warrant issued
☐ Warrantless arrest
☐ No probable cause found

Magistrate Signature

6-14-01
Date

Mag. Ct. Crim. Rules 3, 4
SCA-M310-1 / 1-98

White - return
Green - defendant
Yellow - file
Pink - complainant
Goldenrod - prosecutor

(Criminal Complaint Continued)

CASE NO. 01-F-205

or pawn this ring.

The cooperating individual was met by Charles E. Chuck Canterbury and this individual explained that they wished to pawn a ring. Mr. Canterbury advised the cooperating individual that he did not pawn this type of item but agreed to purchase it outright for the sum of $15.00 in U.S. Currency. The cooperating individual agreed to make this transaction and Mr. Canterbury exchanged $15.00 in U.S. Currency for the ring. At no time did Mr. Canterbury make any effort to obtain identification from the cooperating individual nor did he record this transaction in any manner.

Any dealer in precious metals or gemstones is required to report any purchase of such items to the Sheriff of the County within 24 hours of such purchase in writing. At approximately 1:18pm on 06/14/01 I spoke with Sheriff William R. Laird, IV. and with the Sheriff's Department Secretary, Cora Cooper. Both of these individuals stated that they had not received any written notification of any transactions concerning precious metals from Mr. Canterbury in the preceding 24 hours.

Detective J.K. Sizemore

FAYETTE COUNTY
CIRCUIT CLERK
2001 AUG -2 P 2:03
THELMA M. KINCAID

SCA-M310-2/11-93

White - return
Green - defendant
Yellow - file
Pink - complainant
Goldenrod - prosecutor

CERTIFICATE OF SERVICE

I, Scott E. Johnson, hereby certify that on the 28th day of August, 2006, I caused to be served the foregoing "**BRIEF OF FAYETTE COUNTY APPELLEES**" upon all counsel of record, by depositing a true copy thereof in the United States mail, postage prepaid, in an envelope addressed as follows:

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